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IN THE

# Supreme Court of the United States

RODERICK JACKSON,

*Petitioner*,

*v.*

BIRMINGHAM BOARD OF EDUCATION,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## *AMICI CURIAE* BRIEF OF WOMEN'S SPORTS FOUNDATION, MYRA SADKER ADVOCATES, ET AL. IN SUPPORT OF THE PETITIONER

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## QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Women's Sports Foundation (WSF) is a non-profit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and to creating an educated public that supports gender equity in sports. The WSF distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries per year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of girls and women in sports.

Myra Sadker Advocates (MSA) is a non-profit organization dedicated to promoting equity in and beyond schools. Myra Sadker, educator, author, and Dean at American University, exposed both the subtle and blatant educational biases that limit the academic, psychological, economic and physical potential of both males and females. MSA supports research, training and special programs to assist teachers, parents, children and other adults in eliminating such biases from America's schools.

The National Association for Girls and Women in Sport (NAGWS) began in 1899 and continues today as an association of 4,000 teachers, coaches, professors and administrators dedicated to equality in sport for girls and women. The mission of NAGWS is to develop and deliver equitable and quality opportunities for all girls and women through relevant research, advocacy, leadership development,

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1. No counsel for any party authored this brief either in whole or in part, and no persons other than the amici curiae and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

educational strategies, and programming in a manner that promotes social justice and change.

The National Association of Collegiate Women Athletics Administrators (NACWAA) is a not-for-profit, 501(c)(3) membership organization, dedicated to providing educational programs, professional and personal development opportunities, information exchange, and support services to enhance college athletics and to promote the growth, leadership and success of women as athletics administrators, professional staff, coaches and student-athletes. NACWAA supports all initiatives to protect those suffering from retaliation for bringing gender equity complaints to Title IX enforcement officials.

Founded in 1985, the National Consortium for Academics and Sports (NCAS) is an ever-growing organization representing 218 colleges and universities which provide opportunities for current and former student-athletes to continue their pursuit of higher education, while working in the community addressing social issues. The mission of the NCAS is to create a better society by focusing on educational attainment and using the power and appeal of sport to positively affect social change.

Created in 1984, Northeastern University's Center for the Study of Sport in Society (CSSS) is committed to the use of sports as a powerful tool for positive social change. The mission of the CSSS is to increase awareness of sport and its relation to society, and to develop programs that identify problems, offer solutions and promote the benefits of sport. The CSSS supports all those in need of protection from retaliation for submitting grievances to Title IX officials.

Dads and Daughters is a 501(c)(3) national advocacy non-profit for fathers and daughters. Dads and Daughters



inspires fathers to actively and deeply engage in the lives of their daughters and galvanizes fathers and others to transform the pervasive cultural messages that devalue girls and women. On behalf of its membership, Dads and Daughters clearly states that fathers want their daughters' coaches and advocates to stand up for their civil rights. Dads and Daughters believes that it is absolutely essential for coaches and advocates to be protected from retaliation of any kind when they act on behalf of our children's rights and well-being.

## SUMMARY OF ARGUMENT

A private right of action for retaliation under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 - § 1688, is necessary to effectuate fully the purposes of the statute, which are to remedy and prevent gender discrimination in all aspects of education, including sports. Opportunities to participate in sports are educational gateways to economic and professional opportunities in contemporary American society. Girls and women, in particular, derive substantial physical, psychological and cultural benefits from sports participation that continue through adulthood and into old age. This case is ultimately about implementing the purpose behind Title IX, to achieve Congress's intent to ensure that girls and women are treated equitably and are given the opportunity to fully realize the benefits that athletics offers.

The nation has witnessed a revolution in sports participation for women. *See Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) ("Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports."), *cert denied*, 520 U.S. 1186 (1997). Enormous increases in sports participation have led to riveting Olympic victories, the ability to watch the United States win the Women's World

Cup before a packed house at the Rose Bowl, and new professional opportunities such as the Women's National Basketball Association. As the Ninth Circuit recently noted, the "victorious athletes understood as well as anyone the connection between a 27-year-old statute and tangible progress in women's athletics." *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 773 (9th Cir. 1999). Although the implementation of Title IX has led to impressive gains in opportunities for girls and women, the playing field is still far from level. Women's athletic programs continue to lag behind men's programs by every measurable criterion, including participation opportunities, athletic scholarships, operating budgets and recruiting expenditures.[2] Much remains to be done.

If Title IX's goal of gender-equity in athletics is to be fully achieved, those who complain about discrimination – and particularly coaches who are the gatekeepers of opportunities and the advocates for girls and women in sports – must be protected from retaliation for actions taken in furtherance of this goal. Coaches are uniquely positioned to prevent and informally remedy the discrimination and inequities that arise within the educational institutions in which they coach. Yet coaches face fragile employment realities that render them particularly vulnerable to retaliatory actions. Without protection from retaliation, coaches – who should be the strength and voice for their student-athletes – are rendered speechless, and thus ineffectual, in the enforcement of Title IX.

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2. For example, while women in National Collegiate Athletic Association (NCAA) Division I member institutions represent 54.5 percent of the student bodies, they represent less than 44 percent of athletes, 34 percent of the operating budgets, 33 percent of the recruiting budgets, and just 44 percent of the athletic scholarships. *See* 2001-02 NCAA Gender-Equity Report at 11, 23, 24 (2002), *available at* http://www.ncaa.org/library/research/gender_equity_ study/2001-02/2001-02GenderEquityReport.pdf#gender_equity. Every year male athletes receive $208 million more than female athletes in college athletic scholarships at NCAA member institutions. *See id.* at 23, 30.



Consistent with this Court's recognition of the need for a broad interpretation of anti-discrimination laws, Title IX should be interpreted to prevent educational institutions that receive federal funds from engaging in retaliation against coaches and others who act in furtherance of Title IX's laudable purpose. Administrative enforcement under the Department of Education, through its Office for Civil Rights (OCR), has been an inadequate measure for effectively ensuring compliance with Title IX in athletics. Because administrative enforcement fails to rectify existing discriminatory behavior, and because most students are ill-equipped to carry the burden of enforcing the law themselves, private enforcement by way of actions for retaliatory discharge is essential to effectuate the statutory goal of eliminating gender discrimination in athletics.

## ARGUMENT

### A PRIVATE CAUSE OF ACTION FOR RETALIATION IS CRITICAL TO ACHIEVE TITLE IX'S PURPOSE OF ELIMINATING GENDER DISCRIMINATION IN EDUCATION.

Title IX is the essential means of leveling the playing field for our nation's youth. Gender equity has not yet been achieved, and indeed cannot fully be achieved, absent one of the most potent and efficient arrows in the Title IX quiver: a claim for retaliation. To be effective, this claim must apply to persons in key positions, such as coaches, who are uniquely positioned to speak for their athletes and who are uniquely vulnerable without the shield that a retaliation claim provides.

Coach Jackson brought a federal lawsuit to challenge his school's retaliation against him for protesting, as violative of Title IX, the unequal funding and access to athletic equipment and facilities of the girls' basketball team.

In dismissing his claim, the Eleventh Circuit relied on this Court's holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that individuals may not assert claims under Title VI for disparate impact discrimination. The Eleventh Circuit held that because retaliation is only explicitly mentioned in the Title IX regulations and is not mentioned in the statute itself, Coach Jackson had no right to sue to challenge the retaliatory actions taken against him. *See Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344-46 (11th Cir. 2002). The Eleventh Circuit thus held that Title IX does not permit a retaliation claim by those who protest gender discrimination, no matter how purposeful the retaliation, and no matter how much it chills efforts to ensure the purposes of Title IX are fulfilled, simply because retaliation is not specifically mentioned in the language of the statute. In so ruling, the Eleventh Circuit ignored Title IX's broad prohibition against gender discrimination, Congress's purpose in enacting the statute, and the long history of including claims for retaliation in anti-discrimination laws.

## I. The Sports Experience Provides Girls and Women With Significant Benefits.

Athletics play a vital role in society, especially for women. In 1973, 50 million viewers watched Billie Jean King defeat Bobby Riggs in the "Challenge of the Sexes," a victory that directly confronted previously entrenched gender stereotypes. The performances of female athletes such as Joan Benoit, Mary Lou Retton, Jackie Joyner-Kersee, Janet Evans, Bonnie Blair, Lisa Leslie and Mia Hamm continue to inspire and encourage our nation's girls to break down the barriers that limit their potential. Women athletes are heroes and mentors, leaders and role models. Each female athlete is a living affirmation of why it is important to ensure equal opportunity in sports.



This Court has recognized that education plays "a fundamental role in maintaining the fabric of our society," *Plyler v. Doe*, 457 U.S. 202, 221 (1982),[3] and athletics play a vital part in that role. Sports participation teaches young people critical lessons, including how to set goals and work to achieve them, how to win and lose gracefully, how to postpone short term gratification for long term rewards, how to perform under pressure, how to function as part of a team, and how to take criticism. Student-athletes develop self-confidence, perseverance, and a desire to succeed. Contrary to the "dumb jock" myth, interscholastic sports participation provides both boys and girls from diverse socioeconomic, racial, and ethnic backgrounds measurable positive educational impacts, including improvements in self-concept, higher educational aspirations in the senior year, improved school attendance, increased math and science enrollment, more time spent on homework, and higher enrollment in honors courses. *See* H.W. Marsh, *The Effects of Participation in Sport During the Last Two Years of High School*, 10 Soc. Sport J. 18 (1993).

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3. *See also Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (this Court recognized the import of gender equity stating, "because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our *educational institutions*, in the job market and, perhaps most conspicuously, in the political arena") (emphasis added). The special status of educational institutions recently led this Court to embrace the pursuit of diversity as a compelling interest, and to acknowledge that diverse classrooms allow enlightened and vigorous class discussions, extinguish stereotypes, and lead to cross-cultural understanding. *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

### A. Sports Participation Improves Girls' Educational Achievement.

The educational benefits girls, in particular, derive from sports participation are stunning. For example, female student-athletes have higher grades and higher graduation rates than their non-athletic peers. NCAA graduation rates for women remain high – 68% compared to 58% for the Division I female student body. *See 2001 NCAA Graduation Rates Report*, *available at* http://www.ncaa.org/grad_rates/2001/index.html. In high school, both white and black female student-athletes graduated at rates higher than their student-body counterparts. *See* Nat'l Fed'n of State High School Ass'ns, *The Case for High School Activities* (2004), *available at* http://www.nfhs.org/scriptcontent/Va_custom/va_cm/contentpagedisplay.cfm?content_ID=71&SearchWord=case%20high%20school%20activities (A state-wide, three-year study by the North Carolina High School Athletic Association found that athletes had higher grade point averages (by almost a full grade point), lower dropout rates, and higher high school graduation rates, than their non-athletic peers); *see also* Richard E. Lapchick, *Keeping Score When it Counts: Graduation Rates and Diversity in Campus Leadership for the 2004 Women's Sweet 16 Teams*, University of Central Florida's Institute for Diversity and Ethics in Sports (March 2004) (study showing that female athletes in the national basketball tournament had exceedingly high graduation rates).

These educational benefits appear to translate into business success. A recent study by the Oppenheimer Fund found that more than four out of five executive businesswomen (81%) played sports growing up – and the vast majority reported that the lessons they learned on the playing field have contributed to their success in business. *New Nationwide Research Finds: Successful Women Business Executives Don't Just Talk a Good Game . . . They Played One* (2002), *available at* http://www.massmutual.com/mmfg/pdf/boardroom.pdf. The business of sports, including athletic administration, coaching, sports management, sports medicine, marketing and manufacturing, is a nearly $200 billion per year industry. 4 Sports Bus. J. 47 (March 2002), *available at* http://www.sportsbusinessjournal.com/images/random/SportsIndustry.pdf. A common gateway into a career in the sports industry is having significant sports experience on one's resume.



### B. Sports Participation Improves Girls' Health.

Girls and young women today face a daunting array of increasing physical health risks, such as obesity, heart disease, breast cancer, osteoporosis, tobacco and drug use, unwanted teen pregnancy, sexually transmitted diseases, depression and suicide. These health risks account for much of the more than $1 trillion spent on healthcare for treating these issues. *See generally* Don Sabo et al., *The Women's Sports Foundation Report: Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls* (2004), *available at* http://www.womenssportsfoundation. org/binary-data/WSF_Article/pdf_file/990.pdf ("*Her Life Depends On It*") (a comprehensive survey of scientific research on girls' health, sports participation, and physical activity). As one example, in 1970, only one out of every twenty-one girls was obese or overweight; today, even though more girls are playing sports, that figure is an alarming one in six. *See* Fed. Interagency Forum on Child & Family Statistics, *America's Children in Brief: Key National Indicators of Well-Being* (2004), *available at* http://childstats.gov/americaschildren/pdf/ac04brief.pdf. The available research demonstrates that more physical activity and sports participation are fundamental solutions for many of these serious health and social problems faced by our nation's young girls. *See Her Life Depends On It*, *supra*, at 38.

For example, research demonstrates that women who participated in regular physical exercise during their reproductive years have up to a 60% reduced risk of breast cancer. *See* Leslie Bernstein, et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young Women*, 86 J. Nat'l Cancer Inst. 1403 (1994) (reporting that one to three hours of exercise per week over a woman's reproductive lifetime may bring a 20-30% reduction in the risk of breast cancer, and four or more hours of exercise per week may reduce the same risk by almost 60%). Osteoporosis afflicts 10 million Americans, 80% of whom are women. *See* Nat'l Osteoporosis Found., *Fast Facts* (2003), *available at* www.nof.org/osteoporosis/diseasefacts.htm. Physical activity and sports participation in the school-age years have been shown to increase bone density. D. Teegarden, et al., *Previous Physical Activity Relates To Bone Mineral Measures In Young Women*, 28 Med. & Sci. in Sports & Exercise 105 (Jan. 1996). Alzheimer's disease mainly affects the oldest people in the United States, who are disproportionately women. D.A. Evans et al., *Prevalence Of Alzheimer's Disease In A Community Population Higher Than Previously Reported*, 262 J. Am. Med. Ass'n, 2251 (1989). Higher levels of physical activity earlier in life may reduce the risk for Alzheimer's later in life. *See* Sandra K. Pope, et al., *Will a Healthy Lifestyle Help Prevent Alzheimer's Disease?*, 24 Annual Review of Public Health, 111 (2003). These results suggest that implementation of regular physical exercise programs as a critical component of a healthy lifestyle should be a high priority for adolescent and adult women.

Female athletes are also less likely to smoke or use illicit drugs. *See, e.g.*, M.J. Melnick et al., *Tobacco Use Among High School Athletes And Nonathletes: Results Of The 1997 Youth Risk Behavior Survey*, 36 Adolescence 727 (2001); *see also* Wyoming High School Activities Ass'n, *Student Activities Survey* (1998) (finding that only 25% of high school



athletes, compared to 40% of non-athletic high school students, smoke cigarettes); K.E. Miller et al., *The Women's Sports Foundation Report: Health Risks and the Teen Athlete*, 1, 8 (2000) *available at* http://www.womenssportsfoundation.org/binary-data/WSF_Article/pdf_file/771.pdf. (national study finding that female athletes, especially white female athletes, involved in school or community sports were significantly less likely to use marijuana, cocaine or most other illicit drugs); R.R. Pate et al., *Sports Participation and Health-Related Behaviors Among U.S. Youth*, 154 Archives of Pediatric & Adolescent Med. 904 (2000) (same); *The Case for High School Activities, supra* (concluding that 92% of high school athletes do not use drugs). Additionally, female athletes are less likely to become pregnant as teenagers than their non-athlete counterparts. *See* T. Dodge and J. Jaccard, *Participation in Athletics and Female Sexual Risk Behavior: The Evaluation of Four Causal Structures*, 17 Journal of Adolescent Research 42 (2002); The President's Council on Physical Fitness and Sports Report, *Physical Activity & Sports in the Lives of Girls*, (Spring 1997), *available at* http://education.umn.edu/tuckercenter/pcpfs/default.html (citing to studies suggesting that higher rates of athletic participation among adolescent girls were significantly associated with lower rates of both sexual activity and pregnancy).

Athletic participation is also associated with heightened mental health benefits. Female high school athletes show a markedly lower incidence of considering or planning a suicide attempt, and women and girls who participate in regular exercise suffer lower rates of depression. *See* Don Sabo et al., *High School Athletic Participation and Adolescent Suicide: A Nationwide Study*, International Review for the Sociology of Sport (forthcoming 2004) (on file with the Women's Sports Foundation); G. Nicoloff, and T.S. Schwenk, *Using Exercise to Ward Off Depression*, 9 Physician Sports Med. 23, 44-58 (1995); R.M. Page & L.A.

Tucker, *Psychosocial Discomfort and Exercise Frequency: An Epidemiological Study of Adolescents*, 29 Adolescence, 113, 183-91 (1994) (suggesting that physically active adolescents tend to feel less lonely, shy, and hopeless as compared to their less physically active peers). Indeed, this research suggests that the failure to provide girls with athletic and fitness opportunities endangers the public health. *See Her Life Depends On It*, *supra*, at 5.

In short, research demonstrates that physical activity and sports participation provide potential long-term economic benefits and offer fundamental solutions for many of the serious health and social problems facing America's girls. *Amici's* greatest concern is preserving and advancing these benefits for girls and young women.

## II. Title IX Has Only Partially Achieved Its Broad Congressional Purpose.

The provision of equal educational opportunities is the key Congressional purpose of Title IX and the Civil Rights Restoration Act. Congressional drafters of Title IX believed its provisions were necessary to achieve their "obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979) (quoting 122 Cong. Rec. 31,472 (1976) (remarks of Sen. Kennedy)). After passing Title IX, the current implementing regulations were subject to an extensive administrative comment period during which approximately 10,000 comments were received. This process made clear the important role Title IX had come to play with regard to sports. As testified to by Casper Weinberger, then-Secretary of the Department of Health, Education and Welfare:

> [with] regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them.



*Sex Discrimination Regulations, Hearings Before the Subcomm. on Postsecondary Education of the Comm. on Education and Labor*, 94th Cong., 1st Sess. at 439 (1975).

This Court has said that a key purpose of Title IX is to provide individuals with "effective protection against" discrimination based on gender, and has consistently construed the statute's provisions broadly. *Cannon*, 441 U.S. at 704; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (recognizing a student's private right of action in a peer sexual harassment case even though Title IX contains no express language prohibiting "sexual harassment" nor any regulation pertaining to sexual harassment). This Court's precedents have consistently supported a broad interpretation of Title IX's protections. *See* 34 C.F.R. § 106; *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (upholding the constitutionality of the Title IX regulations governing employment).

Title IX is on its way toward accomplishing its mission of ending discrimination in athletics. It has provided the legal impetus for millions of girls and women to obtain the benefits of participating in competitive athletics. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX, today that number has expanded nearly five-fold to approximately 163,000 women. *See* Dep't of Health, Educ., & Welfare, *Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,419 (1979) ("Policy Interpretations"); U.S. General Accounting Office, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, No. 01-297 at 7 (March 2001).

Opportunities for girls at the high school level have increased even more dramatically. Since 1972, female participation in high school athletics has grown by over 971%, from 294,000 to almost 2.9 million. *See* Nat'l Fed'n of State High School Associations, *2003 High School Athletics Participation Survey* (2003). Before Title IX, athletic scholarships for women were almost non-existent, whereas today young women have the opportunity to earn one of 15,000 athletic scholarships awarded per year. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study Twenty Seven Year Update: 1977-2004*, *available at* http://webpages.charter.net/womeninsport. Because of Title IX, girls and young women are able to take advantage of superior coaching, facilities, equipment, medical treatment, travel, and publicity as compared with their athletic foremothers.

Nevertheless, boys' and girls' sports experiences remain far from equal. In 2003, the Secretary of Education's Commission on Opportunity in Athletics reported that it:

> heard troubling testimony that some women and girls are still subject to discrimination, both in access to athletic participation opportunities and in gaining equal treatment in facilities and support services. In some cases, there are discrepancies in the share of scholarships and budgets that cause women to lag behind men in both participation and equal treatment.

U.S. Dep't of Educ., *"Open to All" Title IX At Thirty* at 22 (2003), *available at* http://www.ed.gov/about/bdscomm/list/athletics/report.html. As the Department of Education highlighted in its 1997 report, "we still need to recognize some dismaying facts in our efforts to achieve equity." U.S. Dep't of Educ., *Title IX 25 Years of Progress* (1997),



*available at* http://www.ed.gov/pubs/TitleIX/part6.html. In relation to athletics, the report noted that boys' varsity teams greatly outnumber girls' varsity teams at the high school level, women receive only one-third of athletic scholarships, and operating expenses for women's college sports represent less than one-quarter of total operating expenses for college sports. *See id.*

Indeed, despite clear guidance from various federal courts as to a school's obligations for compliance,[4] clear directives from the OCR,[5] and facts that are often undisputed,[6] the need continues to file Title IX actions in

4. *See Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000) (affirming and applying Title IX regulations, including requirements for equal participation and equal treatment for female athletes); *accord Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir. 1994), *cert. denied*, 531 U.S. 824 (2000); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Cohen I*), and 101 F.3d 155, 170 (1st Cir. 1996) (*Cohen II*), *cert. denied*, 520 U.S. 1186 (1997); *Roberts v. Colo. State Bd. of Agriculture*, 998 F.2d 824, 828 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

5. *See Policy Interpretation*, *supra* (describing the three major areas of regulatory compliance as: "Athletic Financial Assistance (Scholarships)," "Equivalence in Other Athletic Benefits and Opportunities," and "Effective Accommodation of Student Interests and Abilities"). The Title IX regulations were originally published at 45 C.F.R. § 86, and are now located at 34 C.F.R. § 106 (2004). For an examination of the general athletics regulation, *see* 34 C.F.R. § 106.41, and for review of the athletic scholarships regulation, *see* 34 C.F.R. § 106.37(c). *See also* Valerie Bonnette & Daniel Lamar, *Title IX Athletics Investigator's Manual* 7 (1990).

6. Title IX athletics claims are unique because parties often can agree to many of the underlying facts. For example, student-athletes and schools can stipulate as to the number and size of male and female

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federal courts in order to gain the protections afforded by the statute. Recent federal cases support the fact that girls and women still need protection against discrimination based on gender as well as outmoded stereotypes regarding their athletic interest and abilities. *See generally*, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (plaintiffs challenging the Department of Education's implementation of Title IX relied on improper stereotype that women are less interested in sports); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 02-1127, 2004 WL1660268, at *3 (6th Cir. July 27, 2004); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. June 4, 2004) (finding that school's scheduling decisions regarding soccer seasons improperly deprived girls, but not boys, of opportunity to compete in regional and state championships); *Daniels v. Sch. Bd. of Brevard County, Fla.*, 995 F. Supp. 1394 (M.D. Fla. 1997) (finding that the boy's baseball team had an electronic scoreboard, bathroom facilities, a concession stand, a press box, lighting for nighttime play, new bleachers, and large signs publicizing the team, while the girls' softball team had none of these, and noting, "[the school] sends a clear message to players, fellow students, teachers and the community at large, that girls' varsity softball is not as worthy as boys' varsity baseball."); *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (showcasing the inferior manner in which female student-athletes were treated compared to male student-athletes).

Regrettably, despite the fact that thirty-two years have passed since the enactment of Title IX, the "glass sneaker"

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teams, the size of approved budgets for the men's and women's programs, and certain aspects of athletic facilities, such as whether the facility has water, electricity, storage units, restrooms, broadcasting equipment, type and quantity of spectator seating, concession areas, etc.



continues to exist for female participants in interscholastic and intercollegiate athletics. *See* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 Fordham Intell. Prop. Media & Ent. L.J. 551, 553 (2003) ("The term 'glass sneaker' reflects that, while impressive strides have been made for female students since Title IX's inception thirty years ago, females are still imbued with the attitude that athletic employment, participation opportunities, and benefits are a gift and not an entitlement."). Congressional intent underlying Title IX will certainly be frustrated if educational institutions receiving federal funds remain free to retaliate against individuals who complain about gender discrimination. Equally troubling is the fact that the benefits the sports experience provides to women and girls, and the remarkable strides taken since the passage of Title IX, will be lost.

## III. A Retaliation Claim is a Necessary Mechanism for Fully Achieving Title IX's Statutory Intent

### A. Coaches Are Direct Victims of Discrimination.

The strength of our civil rights laws, including Title IX, hinges on the willingness of persons to come forward with information about discrimination, just as Coach Jackson did. This Court has held that "there can be no question" that one who is not a minority but who is "punished for trying to vindicate the rights of minorities" has standing to raise a discrimination claim on his own behalf. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *see also Peters v. Jenney*, 327 F.3d 307, 318 n.10 (4th Cir. 2003) (noting that the Eleventh Circuit's decision in *Jackson* "did not consider the impact of *Sullivan* and its progeny"). Coaches, in particular, are uniquely well-positioned both to observe discriminatory conduct from their vantage point on the front

line, as well as to advocate on behalf of their student-athletes against these discriminatory conditions. Moreover, drawing a distinction, as the court did below, between some class of "direct" and "indirect" victims of gender discrimination in education is not only virtually impossible, but likely to frustrate Title IX's goal of eliminating all forms of gender discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1346 (11th Cir. 2002) (stating that "even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination, [coaches are] plainly . . . not within the class meant to be protected by Title IX.").

Despite the Eleventh Circuit's conclusion to the contrary, coaches fall squarely within the class of persons intended to be protected by Title IX. This Court has already recognized that Title IX's employment protections extend to teachers and coaches. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-31 (1982) (examining legislative history and determining that eliminating discriminatory employment practices in educational settings is at the "heart" of Title IX); *see also* 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh) ("The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment. . . ."). Indeed, Title IX was enacted in large part to close the loopholes in existing legislation, and to extend equal employment opportunities to educational institutions. 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh). As educators as well as employees, teachers and coaches suffer from the precise gender discrimination Title IX is designed to eradicate.

It would be imprudent (and indeed, impossible) to draw lines between coaches and their teams, labeling one a direct and one an indirect victim of gender discrimination. Coaches themselves suffer direct discrimination when resources such



as equipment and practice time are denied on the basis of sex. In the increasingly competitive environment in which many qualified applicants compete for each coveted coaching spot, a losing record can be a career killer. Few criteria are more important to a coach's career than the win-loss record achieved at his or her last position. If resources crucial to a team's success are granted to the boys' team but denied to the girls' team, the damage to the career of the girls' coach clearly occurs "on the basis of sex" – in direct violation of Title IX. *See, e.g., Coble v. Hot Springs Sch. Dist. No.* 6, 682 F.2d 721, 734 (8th Cir. 1982) (recognizing that it could constitute employment discrimination to grant career assignments and benefits to the coaches of boys' teams while denying them to coaches of girls' teams).

Additionally, gender bias has been shown to be detrimental to boys as well as girls. Discrimination in a school setting makes it difficult to separate direct and indirect victims generally. For example, studies have shown that boys feel "boxed in" – their opportunities limited by the same cultural expectations and stereotypes that jeopardize girls. *See, e.g.*, Myra Sadker & David Sadker, *Failing at Fairness* 197-225 (1994); Craig P. Flood & Susan Shaffer, *Safe Boys, Safe Schools*, WEEA Digest, Nov. 2000, 3-5, *available at* http://www.edc.org/WomensEquity/pdffiles/males.pdf.pdf. While girls may decide not to take a challenging math class, boys often overvalue their own abilities, selecting classes or activities that are beyond them. *See* Michael Kimmel, *What About the Boys?*, WEAA Digest, Nov. 2000, at 2, *available at* http://www.edc.org/WomensEquity/pdffiles/males.pdf.pdf.

It is unwise, unjust, and contrary to the mandate of Title IX to claim that only certain victims of discrimination can call attention to violations. Schools influence the intellectual and moral development of children, and any discrimination that occurs within their walls is especially insidious and

destructive. Unfair treatment "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The goal of Title IX is not to ensure that there are only indirect victims of discrimination, but to ensure that, within our school walls, no one is a victim of discrimination at all.

In summary, coaches are direct victims of discrimination when they face damage to their careers – either from receiving unequal treatment based on the gender of the athletic teams they coach or from discriminatory retaliation for protesting such conditions. But unlike other forms of discrimination, gender bias in schools does not clearly divide individuals into a class of discriminators and a class of victims. Unfair treatment in athletics and in schools infects our children's consciousnesses, negatively and permanently altering their perceptions of the world and their notions of equality and justice.

### B. Student-Athletes Are Not the Most Efficient Enforcers of the Law.

Institutional and social disincentives create barriers to girls' ability to remedy gender discrimination in athletics. If the enforcement of the law rests solely in the hands of students, many of whom are only children, violations will go largely ignored.

*Amici* have extensive experience with students hoping to remedy inequities at their schools. These students face a wide array of social costs that prevent them from even raising the issue of equitable resources for boys and girls. In many towns, male sports are the centerpiece of town pride and attention. Female athletes who attempt to secure a more equitable distribution of resources between boys' and girls'



teams are often socially ostracized, viewed as pilfering resources from the revered boys' programs. These students, who are often viewed as "boat rockers," also risk losing their schools' support in securing athletic or academic scholarships and recommendations. Merely protecting students from Title IX retaliation cannot remove this disincentive.

Institutionally, students also face bureaucratic hurdles, as it can take several years before an alleged violation is rectified, a delay that stretches well beyond a student's graduation date. *See Cook v. Colgate Univ.* 992 F.2d 17, 20 (2d Cir 1993) (dismissing Title IX case as moot because plaintiffs would graduate before complaint could be remedied). Additionally, student-athletes, unlike school employees, generally are not informed about the provisions of Title IX, nor are they aware of the enforcement mechanisms the law provides. In a recent study, less than 5 percent of students had even heard of Title IX. *See* Karen Zittleman, Title IX and Gender Issues: A Study of the Knowledge and Perceptions of Middle School Teachers and Students (2004) (unpublished doctoral dissertation, American Univ.) (on file with Myra Sadker Advocates).[7] Even if a school *has* assigned such a coordinator,[8] students cannot

7. According to Zittleman's dissertation, out of 540 middle schoolers surveyed in Maryland, Virginia, the District of Columbia, and Wisconsin, only eight students could offer a description of Title IX. These responses are characterized by a minimal understanding of the law as related to athletics or a general notion of gender equity and as only offering protections to females. Moreover, no student could identify their school Title IX coordinator or the U.S. Dept of Education/OCR as the respective local and national contacts for help.

8. *Title IX Responsibilities: Dear Colleague*, Office for Civil Rights, U.S. Dep't of Educ., Apr. 26, 2004, *available at* http://www.ed.gov/about/offices/list/ocr/responsibilities_ix.html (noting several instances where schools have not complied with the requirements of Title IX, including the failure to designate and/or train an employee to serve as the Title IX coordinator).

identify who that person is. *See* Conn. Women's Educ. & Legal Fund, *Keeping Score: A Report Regarding Connecticut Secondary Schools and Title IX's Mandate for Gender Equity in America* (1997) (indicating that only 8% of student-athletes surveyed could identify their Title IX coordinator). To achieve Congressional purpose and correct Title IX violations, enforcement of the law cannot be placed solely in the hands of those least likely to have the means or the incentives to enforce it - female students.

### C. Administrative Procedures Are Less Efficient Mechanisms for Enforcing Title IX.

*Amici* also have extensive experience working with aggrieved female athletes and their families who have attempted to resolve their schools' athletic inequities through the Office of Civil Rights. *See* Women's Sports Foundation, *Report on Title IX, Athletics and the Office for Civil Rights: An Examination of Letters of Findings Issued by the Office for Civil Rights in the Post-Restoration Act Era* (1997). This experience suggests that the administrative enforcement of Title IX through the OCR is insufficient. Inadequate resources leave the OCR unable to address all Title IX violations, including complaints of retaliation. In 2001, the OCR initiated just two Title IX athletics reviews of institutions. *See* Nat'l Coalition for Women and Girls in Educ., *Title IX at 30: Report Card on Gender Equity* 20 (June 2002), *available at* http://www.ncwge.org/title9at30.pdf.

Furthermore, individuals who file complaints with the OCR have neither the right to participate in the investigation and enforcement of their complaints nor the right to make sure their evidence or witnesses are heard. The agency is not even required to provide relief to the individual complainant as part of the compliance agreements it obtains. Indeed, the agency can opt not to investigate a particular complaint at



all. Clearly, none of the basic elements of due process that characterize judicial proceedings are present. Court cases confirm that OCR's review process and findings often miss ample evidence of discrimination. *See, e.g., Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828-29 (10th Cir.) (rejecting OCR's conclusion that Colorado State was in compliance with Title IX); *see also The Glass Sneaker*, *supra*, at 602. Remarkably, but tellingly, the OCR's only explicit disciplinary power – withholding federal funds, *see* 20 U.S.C. § 1682 – has never been exercised in the 32 years of Title IX's existence.

More than two decades ago, this Court rejected the contention that Congress intended administrative enforcement to be the sole means of enforcing Title IX, recognizing that the right to sue in court is still critical to provide full protection from discrimination. *See Cannon*, 441 U.S. at 702-09. That right remains critical. Retaliation is a form of discrimination and must be encompassed in the existing right of action.

### D. Coaches Are More Efficient Enforcers of the Law.

Practically, coaches have institutional advantages in terms of knowing how and with whom to effectively address discrimination. Coaches have access to information that students do not; namely about resource allocation between and among athletic teams. Coaches are in a natural position to know the intricacies of their teams, including the number of students on the team; the equipment, supplies and facilities provided; scheduling of games and practices; opportunity to receive coaching and academic tutoring; provision of medical services; training facilities and services; housing and dining facilities and services; publicity; and recruiting and support services. *See* 34 C.F.R. § 106.41(c) (citing the above considerations as factors to be utilized in determining whether equal athletic opportunities are available for members of both sexes).

Additionally, coaches generally have collegial relationships with their fellow coaches and administrators, providing avenues to informally remedy complaints, as well as access to important information and policy decisions. This access positions teachers and coaches particularly well to serve as advocates for their students, and to be able to identify the discriminatory situations that should not be part of a student's educational experience. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."). In fact, it is this status that makes a coach "the only effective adversary" against the discriminatory act. *Sullivan*, 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

Nonetheless, *amici* members know that it is difficult and dangerous for coaches to call attention to discrimination when they risk potentially unfettered adverse employment actions. The reality is that many coaches are on one-year, terminable at-will contracts, have no expectation of tenure, and are not members of unions that might otherwise provide support. In the more lucrative positions in the 114 Division I-A NCAA institutions, where negative rumors can permanently extinguish a coach's career opportunities, the stakes are particularly high. For example, one former women's basketball coach who alleged she experienced employment inequities as compared to the men's basketball coach contended that the assistant athletic director at her university informed her that if she "filed a formal complaint about the matter either within or outside the University, she would be terminated from her employment and 'would never work in the Northeast again.'" *Legoff v. Trs. of Boston Univ.*, 23 F. Supp. 2d 120, 124 (D. Mass. 1998). Providing "whistle



blower" protection to those who are both the most knowledgeable and most likely spokespersons regarding violations of Title IX is a necessary means to advance gender equity in athletics.

## CONCLUSION

The strength of our civil rights laws hinges on the willingness of citizens to expose violations. The history and purpose of Title IX supports a private cause of action for retaliation in order to remedy and prevent gender discrimination in education. Because sports participation provides significant physical, economic, and professional opportunities in contemporary American society, and because administrative enforcement efforts alone have proven incapable of effectively protecting individuals from prohibited discrimination in federally funded programs, a private right of action for retaliation under Title IX is necessary. This case is ultimately about effectuating Congress' intent that girls and women be treated equitably by educational institutions. Finding that individuals may not seek full recourse when they are punished by federal fund recipients for protesting sex discrimination would dramatically undermine the purposes of Title IX.

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